Standardizing the Rules Restricting Publication and Citation in the Federal Courts of Appeals

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This note proposes a model rule that would standardize the federal courts of appeals' rules restricting publication and citation of certain opinions. All federal circuit courts currently have some form of such rules. Although these rules have been in effect for over twenty-five years, there is a distinct lack of uniformity among the circuits as to how these rules operate. The author argues that it is time to end this lengthy period of experimentation and standardize the restricted publication and citation rules among the circuits.

The author begins by summarizing the various arguments mustered by both proponents and opponents of restricted publication and citation. The author then analyzes the Eighth Circuit's decision in Anastasoff v. United States, *later vacated, that held the court's own restricted citation rule was unconstitutional. The author next proceeds to examine current circuit court rules regulating the publication and citation of opinions, pointing out the similarities and differences among the various rules and highlighting a few particularly troubling provisions. Finally, the author proposes a model rule regulating restricted publication and citation that would achieve uniformity among the circuits while addressing some of the concerns voiced by opponents of such rules.*

I. INTRODUCTION

The federal court system's expanding caseload has been a concern for much of this nation's existence.[1] Today, this concern is no less justified.[2] The courts, as

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[1] *See* ARTHUR L. GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 65–67 (1931); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1168–69 (1978) (noting concerns about burgeoning caseloads as far back as 1915). Goodhart, in comparing the English and American use of precedent, contended that the American idea of precedent had departed from the English view in part because of the "uncontrollable flood of American decisions." GOODHART, *supra*, at 65. Presaging what later would occur, Goodhart noted that "[u]nless courts set some restraints on the length and number of published opinions," *id.* at 66, the reporting system, the lawyers, and especially judges would be "crushed by this system." *Id.* at 67 (quoting in part the Deputy New York Supreme Court reporter). Indeed, the problem of expanding caseloads in general has been a concern for much longer. *See* Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the*

well as academicians, have engaged in much debate and experimentation over how best to address these concerns.[3] One response has been the adoption over the last twenty-five years of rules that restrict both the publication and citation of some decisions handed down by circuit courts.[4] These rules allow the courts, utilizing various criteria, to designate a decision as "unpublished." Coupled with restricted citation rules that generally either forbid or limit the circumstances in which these unpublished decisions can be cited, it was thought these rules would ease the pressure the burgeoning caseload was exerting on the federal judicial system.

Since the adoption of these rules, the desirability and efficacy of restricted publication and citation of opinions has been hotly contested. Much of the debate pits those who believe these rules are necessary to keep a drowning court system from sinking against those who believe the rules are unfair, inappropriate, or both. A new wrinkle in this debate is the recent decision in *Anastasoff v. United States*.[5] Writing for a panel of the Eighth Circuit, Judge Richard Arnold has called into question the constitutionality of the various circuit rules that permit judges to restrict the binding precedential authority of previous opinions.[6] In *Anastasoff*, the court held unconstitutional the Eighth Circuit rule regulating citation to unpublished opinions that strongly discourages parties in most instances from

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Federal Courts of Appeals, 85 CAL. L. REV. 541, 545 (1997) (noting that the proliferation of decisions was a concern as far back as 350 years ago).

[2] *See* Pamela Manson, *Congress OKs Two New Federal Judgeships for Texas*, TEXAS LAWYER, Jan. 1, 2001, at 8 (reporting that between 1990 and 1999, the number of appeals filed in federal courts increased by thirty-four percent).

[3] As early as the late 1940s, the idea of limiting publication of judicial opinions was broached in both the Third and Fifth Circuits. Reynolds & Richman, *supra* note 1, at 1169. In its annual report for 1971, the Federal Judicial Center, an organization established by Congress to, among other things, study and recommend ways to improve the operation of the federal court system, stated that there was a "widespread consensus that too many opinions are being printed or published or otherwise disseminated." *Id.* at 1169–70.

[4] *See* 1ST CIR. LOC. R. 36; 2D CIR. LOC. R. § 0.23; 3D CIR. L.A.R. 28.3; 3D CIR. APP. 5.2; 3D CIR. APP. 5.3; 4TH CIR. LOC. R. 36(a), (b), (c); 5TH CIR. R. 47.5; 6TH CIR. R. 206; 6TH CIR. R. 28(g); 7TH CIR. R. 53; 8TH CIR. APP. I.; 8TH CIR. R. 28A(i); 9TH CIR. R. 36-2; 9TH CIR. R. 36-3; 10TH CIR. R. 36.2; 10TH CIR. R. 36.3; 11TH CIR. R. 36-2; 11TH CIR. R. 36-3; D.C. CIR. R. 36; D.C. CIR. R. 28(c). In 1973, based upon recommendations from a panel of distinguished lawyers, law professors, and judges assembled by the Center, it published a model rule that laid out the conditions and requirements for determining when a decision should not be published. It was these proposed model rules upon which all of the circuits shortly thereafter developed their own circuit rules regulating the publication and citation of decisions. Reynolds & Richman, *supra* note 1, at 1170–72.

[5] 223 F.3d 898 (8th Cir. 2000), *vacated as moot on other grounds by* 235 F.3d 1054 (8th Cir. 2000). The case was considered moot because the government acquiesced to the plaintiff's position. It is unknown whether the government did so to avoid the issue of whether court rules restricting or denying binding precedential authority of unpublished decisions are unconstitutional.

[6] *Id.* at 905.

citing to unpublished opinions.[7] Because the rule "declares that unpublished opinions are not precedential," the court found that the rule was "unconstitutional under Article III because it purports to confer on the federal courts a power that goes beyond the 'judicial.'"[8] Although subsequently vacated on other grounds, the *Anastasoff* decision at least potentially could provide further ammunition to those who oppose the current regime of restricted publication and citation.

When these rules were first promulgated, each circuit adopted its own rules regarding publication of opinions and permissible citation to them. This lack of uniformity among the circuits was generally approved of as a means of experimenting to find the best possible rules.[9] However, this was not intended to be an unending experiment; the expectation was that eventually uniform rules would be promulgated.[10] Yet, after twenty-five years of experimentation, this expectation still has not been fulfilled. Although each of the federal circuits has some form of publication and citation rules, there is still no uniformity among the restricted circuits.[11] Today, the circuits seem no closer to establishing uniform and fair rules regarding this issue than they were twenty-five years ago.

This note argues that the time for experimentation is over. It accepts as one premise that restricted publication and citation, in some form, is here to stay. Furthermore, although one need not have restricted citation rules to have restricted publication, the absence of such rules would negate nearly all of the benefits of having unpublished decisions.[12] Therefore, these two rules will be

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[7] *Id.*

[8] *Id.* at 899.

[9] *Id.* at 1171–72.

[10] *Id.* at 1172 n.29 ("There are in effect 11 legal laboratories accumulating experience and amending their publication plans on the basis of that experience. Because the possible rewards of such experimentation are so rich, the Conference agreed that it should not be discontinued *until* there is considerably more experience under the diverse circuit plans.") (quoting the 1974 Judicial Conference report) (emphasis added).

[11] *See infra* Part IV.

[12] *See* The Honorable Boyce F. Martin, Jr., *Judges on Judging: In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 193 (1999) ("What distinguishes [unpublished opinions] from published opinions are citation limits. Without such limits there is virtually no distinction between published and unpublished."). The only benefit that would be derived from restricted publication rules without restricted citation rules would be the reduction in the growth of the federal reporters. While this would save libraries, courts, and practitioners some expense in keeping their libraries up to date, this savings by itself does not justify the difficulties such a rule by itself would entail. More importantly, a restricted publication rule by itself will not remedy the original impetus for the rules' enactment: expanding caseloads. *But cf.* Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 961 (1989). Robel argues for universal publication and suggests that those opinions that previously would have been designated unpublished should instead bear a legend prohibiting citation to them under rules similar to the restricted citation rules currently in place. This, Robel argues, would allow lawyers to use these opinions to spot court trends, brainstorm defenses, and locate useful citations while "judges would be encouraged not to change their present behavior, since they would not have to take

treated as necessarily coextensive. Part II of this note provides an overview of both sides of the debate regarding the restricted publication and citation of opinions. Part III more closely examines the *Anastasoff* decision to see whether it substantively adds anything to the debate over restricted publication and citation. Part IV then examines the rules as they currently exist in the various circuits. Finally, Part V attempts to extract from the various circuit rules a uniform rule that will address, as best as possible, the concerns of both sides of the debate.

II. THE DEBATE OVER THE DESIRABILITY OF RESTRICTING PUBLICATION AND CITATION OF OPINIONS

Both those in favor of restricted publication and citation and those opposed to such practices[13] have amassed an array of arguments in support of their respective positions. Supporters of restricted publication and citation rules cite considerations such as judicial efficiency, prevention of inequity among litigants, and practical necessity in support of their position. Those opposed to such rules counter with concerns such as fundamental fairness, less well-reasoned opinions, and a stifling of growth in the law. Although the rules proposed in Part V will completely satisfy neither side of the debate, it is worthwhile to more closely examine each side of the debate in an effort to generate proposed rules that will at least partially address both sides' concerns.

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account of these opinions in any more instances than they now do." *Id.* It is at least debatable whether this plan would, in fact, have no effect on the judges' workload since they may feel compelled to more fully elaborate their reasoning. It is also arguable whether practitioners would be able to use these opinions in many of the ways Robel contends if the judges do indeed continue to write them as they do now. Without sufficient facts and context, lawyers may not understand the nuances of the decision or may incorrectly analyze the decision. These abbreviated opinions would likely also be barren of many useful citations. Finally, given the trend toward greater accessibility of unpublished decisions online, it would seem Robel's concerns are already being met, at least to some extent.

[13] There appears to be a particularly sharp difference of opinion on this matter between the judges who are confronted with the reality of the situation on a daily basis and generally support the rule and academicians who generally oppose the rule. *See* Martin, *supra* note 12, at 178–79 ("Whereas academicians tend to see unpublished opinions as causing a variety of systemic problems, judges tend to see them as a necessary, and not necessarily evil, part of the job.") (citation omitted). Of course there are exceptions to this general line of demarcation. *See, e.g.*, Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999) (critiquing restricted publication and citation rules by the author of the *Anastasoff* decision); Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin*, 60 OHIO ST. L.J. 2025 (1999) (contending both sides of the argument have failed to consider important characteristics of appellate courts that argue for keeping such rules in some form); Robert J. Marineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119 (1994) (arguing for alterations in such rules but retaining them).

A. *The Argument in Favor of Restricted Publication and Citation Rules*

The Chief Judge of the Sixth Circuit has posited that there are only two alternatives available to reduce the crushing burden on the courts as caseloads continue to expand: either "chang[e] the input to United States Courts of Appeals or chang[e] the output from them."[14] By this he means either reduce the flood of cases inundating the Federal Courts of Appeals or else utilize tools such as unpublished decisions to keep up with this constantly expanding caseload.

Reducing the input to the federal appeals courts seems problematic at best. Periodically, there have been discussions over reducing the jurisdiction of the federal courts that might thereby stem the flow of cases to the courts of appeal.[15] However, these attempts have been largely unsuccessful. In addition, it seems doubtful that any politically acceptable jurisdictional reform would be sizeable enough to make a serious dent in the burgeoning caseloads of the federal court system.[16] Given that a meaningful reduction in the input of the federal court system is unlikely,[17] proponents of restricted publication and citation argue that these rules are a necessary alteration in the output of the appeals court system.

Supporters of restricted publication and citation most often point to the practical necessity of these rules to prevent the courts from grinding to a halt. The caseloads of the federal courts continue to aggressively expand.[18] Although the number of judges in the federal system is periodically increased, this increase has in no way kept pace with the expanding docket. In addition, the number of

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[14] Martin, *supra* note 12, at 181.

[15] William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 325–27 (1996). Among the recommendations that have been proposed are a reduction in diversity jurisdiction, a prohibition on removal of ERISA claims below a certain dollar amount, a requirement that state prisoners exhaust state remedies before filing in federal court on civil rights claims, and others. *Id.*

[16] *Id.* at 329–30. The authors note that "[e]ven the most seemingly sensible federal jurisdiction reform proposals have a knack for prompting spirited opposition." *Id.* at 329. For instance, the corporate bar opposed the diversity jurisdiction restrictions proposal while the public interest bar opposed restrictions on state prisoners bringing federal suit on civil rights matters. *Id.* "As a result, few of the proposals have even been introduced in Congress, let alone adopted." *Id.*

[17] Even if all of the proposed measures discussed above were adopted, this would amount to only a seventeen percent decrease in the caseload of the appeals courts. *Id.* at 330. As Richman and Reynolds point out, "[a] decrease of that magnitude would be wiped out by only a few years of normal caseload growth." *Id.*

[18] A Federal Circuit Court of Appeals Judge states that "[i]f all the appeals filed in any intermediate federal court ought to be there, the court would have no need for a selective publication policy. The ones that should not be there create the need." The Honorable Philip Nichols, Jr., *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Introduction: Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 919 (1986).

vacancies in the court system makes this even more problematic. Furthermore, the laborious and often politically charged confirmation process to fill these vacancies ensures that the federal judicial system remains permanently understaffed. Yet even if the system was fully staffed, it seems doubtful that the system could keep pace without procedures such as restricted publication and citation.

Another argument proponents of limited publication and citation rules expound is judicial efficiency. This argument encompasses saving both the courts and litigants time and money. Proponents argue that time is saved because neither the courts nor attorneys for the parties need endlessly research the mass of opinions that have resulted from the explosion of litigation.[19] Limited publication and citation rules, they argue, boil this mass of opinions down to the most well-reasoned expositions of the law. They argue that this allows the courts and attorneys, after reasonable time spent researching, to cull out the law of the circuit rather than becoming awash in a flood of fact-specific opinions that add little to previous explications of the law.[20]

More controversially, courts and some commentators argue that restricted publication and citation rules are necessary because they allow overburdened courts to save time by dispensing decisions involving fact-specific applications of well-settled areas of the law in a more streamlined fashion.[21] Supporters argue that many of these types of cases require only mechanistic application of existing law to the facts of the case and provide no new insight into the law of the circuit. Because these opinions may not later be cited as precedent, judges do not feel as compelled to fully elaborate on the facts and their reasoning, resulting in a significant savings in time to the court.[22] Proponents argue that judges can then utilize this saved time to craft careful, well-reasoned opinions for those cases in which novel or unsettled areas of the law are being litigated.

This resultant saving in time also translates into monetary savings. The

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[19] *See* The Honorable Bruce M. Selya, *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 OHIO ST. L.J. 405 (1994). Judge Selya calls this aspect an "infoload" crisis and states that the "weight of the law is oppressive." *Id.* at 407.

[20] *Id.* at 405–06. Judge Selya questions why "paper, printer's ink, labor, and shelfroom should be devoted to the perpetuation of what for the largest part is avowedly but repetition of things long familiar and is too often merely elaborate elucidation of the obvious." *Id.* (quoting Roscoe Pound). Unlike many proponents of restricted publication, he also makes explicit that his conception of non-publication includes both print and electronic sources. To do otherwise, in his opinion, "defeats the whole purpose of the enterprise." *Id.* at 409. If citation to electronically published opinions is permitted, "the infoload crisis worsens, and unfair advantage is bestowed on more affluent litigants." *Id.* If, on the other hand, citation to electronically published opinions is prohibited, "the transmission of the opinion is at best a tease and at worst an invitation to violate or evade the prohibitory rule." *Id.*

[21] *See* Harry Lee Anstead, *Selective Publication: An Alternative to the PCA?*, 34 U. FLA. L. REV. 189, 197 (1982); Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 WASHBURN L.J. 155, 182–83 (1992).

[22] *See* Martin, *supra* note 12, at 190.

litigants save money because they avoid the necessity of paying their attorneys for the extended research that would result if all opinions could be cited as precedent. The courts save money in the sense that they are able to handle the flood of new cases more expeditiously, somewhat alleviating the necessity of hiring additional judges, clerks, and other support personnel that would be required to churn out published opinions in every case.[23] Additional monetary savings are realized by law libraries, the courts, and attorneys (and therefore, at least marginally, litigants) because, under the restricted publication rules, the voluminous growth in the federal reporters is slowed, thereby reducing the number of new volumes of these reporters that must be purchased.[24]

A final argument raised is that inequity would result in the absence of these rules.[25] Well-financed litigants, proponents of the rule argue, would have access to these opinions and thus be able to utilize them in court while less affluent litigants would not.[26] This would occur in two ways. First, affluent litigants can afford to pay for the additional expense involved in conducting more extensive research. These litigants are better able to bear the cost of additional expenditures both in the time spent by their attorneys conducting this research and for the online research necessary to find unpublished opinions.[27] Second, these litigants are more likely able to afford the services of experienced, specialized attorneys who practice regularly either in the area being litigated or before the court in which their case is being heard. These more experienced, specialized attorneys are more likely to be aware of relevant unpublished opinions and might even keep a file of such opinions, thus unfairly prejudicing the interests of the less well-financed litigants.[28]

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[23] *See* Reynolds & Richman, *supra* note 1, at 1182–85.

[24] Even proponents of restricted publication admit that this argument is losing much of its force. As online legal research proliferates, the need for firms to maintain a well-stocked library diminishes. This argument has now basically been reduced to the contention that "[u]npublished opinions still do save trees and library budgets . . . ." Martin, *supra* note 12, at 191.

[25] *See* Peter Jan Honigsberg & James A. Dikel, *Unfairness in Access to and Citation of Unpublished Federal Court Decisions*, 18 GOLDEN GATE U. L. REV. 277, 294–95 (1988). *But see* Hinderks & Leben, *supra* note 21 at 176–82 (raising the argument but concluding that, with advances in technology and accessibility, this concern is no longer valid).

[26] The counter argument to this contention is that this is already happening outside the courtroom. *See, e.g.*, Robel, *supra* note 12, at 947–48; Shuldberg, *supra* note 1, at 563–65. Opponents of restricted publication argue, quite reasonably, that citation in court briefs is not the only use to which attorneys put previous opinions. However, the utility of many unpublished opinions for many of these other purposes is questionable because of the abbreviated or non-existent recitation of facts, argued but rejected theories, etc. *See also supra* note 12 and accompanying text.

[27] Honigsberg & Dikel, *supra* note 25, at 294.

[28] *See id.* at 295.

B. *The Argument Against Restricted Publication and Citation Rules*

Opponents of restricted publication and citation rules stress that these rules violate ideals of fundamental fairness inherent to our legal system. These opponents specifically argue that like cases should be treated alike. They question whether this maxim can be implemented when litigants are prohibited from citing to previous decisions that speak directly to the issues presently being litigated.[29] In addition, the use of such rules can lead to a lack of uniformity among the district courts within the circuit,[30] making a defendant's chance of prevailing dependent more upon which court in the circuit he happens to be sued in rather than on the merits of his case. Furthermore, opponents contend that the use of restricted publication and citation rules creates a certain unpredictability that unfairly burdens both citizens and counsel.[31] Citizens are unable to plan their affairs with any sense of certainty as to the legal outcome of their current and planned activities. Counsel cannot advise their clients in good faith as to these current or proposed activities with any sense of certainty.

Another argument opponents of restricted publication and citation rules propound is that these rules result in the rendering of less well-reasoned opinions by judges who are secure in the knowledge that these opinions will neither be published in the federal reporters nor subsequently cited to a later court.[32] Furthermore, opponents contend that such rules invite the court to engage in mischief or allow personal predilections to enter into determination of individual suits.[33] Since the judge is assured that such a decision will not alter the law of the

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[29] Anstead, *supra* note 21, at 196–97.

[30] Martin, *supra* note 12, at 180.

[31] Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Opinions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 797–98 (1995) ("Perhaps the most troublesome manner in which selective publication . . . weaken[s] the development of the law is [its] failure to provide guidance for future conduct . . . .").

[32] *See* Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 256 (1998) ("Judges who feel as if they are deciding certain cases in a vacuum might reach different decisions than if they were treating these cases as opinions to be published.").

[33] Reynolds & Richman, *supra* note 1, at 1200. According to these authors, "[a] court might use the cloak of non-publication to avoid the task of reconciling arguably inconsistent decisions. That reconciliation would require the court to elaborate a rule that would deprive it of the freedom to decide on the basis of 'intuitive justice' rather than articulated doctrine." *Id.* A judge or panel may also decide against publication "to avoid public disclosure . . . because it wished to decide the case at bar on an impermissible basis—by a rationale that will not necessarily be extended to all like cases." *Id.* at 1201. Reynolds and Richman also suggest that, in cases with a dissenting opinion, non-publication could result from a trade—namely, "the dissenter(s) will not reveal division on an issue if the majority will refrain from creating a precedent." *Id.* at 1201 n.168; *see* Carpenter, *supra* note 32, at 256 (1998) ("Judges who feel as if they are deciding certain cases in a vacuum might reach different decisions than if they were

circuit (which he or she may prefer as a general rule), he or she may be more inclined to engage in such behavior.[34] In addition, opponents contend that restricted citation rules lead to inefficiency in the justice system.[35] Finally, opponents argue that there are certain legitimacy values that can only be fulfilled if individual litigants appearing before the court believe that they have been given a fair and meaningful hearing, regardless of the outcome.[36] If a court renders a poorly reasoned or curt opinion, these values are not being fulfilled.

Opponents of restricted publication and citation rules point also to what they claim is the stifling effect such rules have on the growth of the law.[37] They assert that all opinions have some value in furthering the development of the law. At a

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treating these cases as opinions to be published.").

[34] A concern has also been voiced about the potential for judges to engage in "free-riding." SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946–1992, at 6 (1995). This would occur when a judge, perceiving a need to pursue a different direction in the law, ignores existing precedent and issues a contrary opinion. Although the judge has refused to abide by precedent when issuing an opinion, he or she will expect current and future judges to treat this opinion as precedent. Of course, "if there are too many free riders, no one will play the game and the precedential system will break down." *Id.*

[35] Stare decisis—the use of precedents—is efficient for three reasons:

> (1) it enables judges "to *avoid* having to rethink the merits of particular legal doctrine" in many cases; (2) it "enables higher courts to select cases for review more efficiently. Those cases that depart dramatically from established precedent can be easily identified and singled out for special attention"; and (3) "[i]t increases the effects of the opinions reached by the intellectually active judges, while simultaneously easing the burden of deciding cases that falls on the shoulders of lazy judges."

Id. at 3 (quoting from Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 102, 108, 112 (1989)).

[36] *See* Carpenter, *supra* note 32, at 254–55; Hinderks & Leben, *supra* note 21, at 185 ("Even if a litigant loses, he or she is likely to feel better about the fairness of the proceeding if he or she believes that a long line of others in a similar position have been treated similarly."). Carpenter explains:

> [W]hen a court issues an unpublished opinion under a no-citation rule, suspicion automatically surrounds the opinion. The losing party asks a host of questions concerning the opinion: Did a judge write it? If so, which one? If not, what is the background of the law clerk who wrote it? What other "shadow cases" might have swayed the court's reasoning? If these questions remain unanswered, the losing party might suspect that the decision was arbitrary or unfair. With an unpublished, uncitable opinion, convincing that party otherwise is difficult.

Carpenter, *supra*, at 255 (footnote omitted).

[37] Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 126 (1995) ("Selective publication suppresses precedent that would help courts decide future cases."). Slavitt also notes that restricted publication rules lessen "the possibility of receiving a grant of certiorari from the United States Supreme Court" because the Court will be "hesitant to devote its limited resources to reviewing a case that will have little future effect." *Id.* at 127.

minimum, those opposed to such rules contend that every decision further buttresses the current law and provides further explication of both how the law applies and why it is the preferred rule. Critics of restricted citation believe that prohibiting citation to these opinions results in a less dynamic exchange between the courts. This ultimately makes changes in the law necessarily more drastic or harsh than the more seamless adaptation that might be possible if citation to all opinions was permitted.

III. *ANASTASOFF*: THE CONSTITUTIONALITY OF RULES RESTRICTING CITATION TO UNPUBLISHED OPINIONS

A. *The* Anastasoff *Opinion*

The recent decision in *Anastasoff v. United States*[38] potentially injects what heretofore had been an argument largely absent from the debate over restricted citation rules.[39] *Anastasoff* involved a dispute between the Internal Revenue Service (IRS) and a taxpayer over the timeliness of a tax refund request.[40] An unpublished decision of the Eighth Circuit, rendered more than ten years earlier, would have lead to an unfavorable outcome for the taxpayer if followed. Seeking to avoid this result, the taxpayer argued that the court was not bound by the earlier decision and pointed to Eighth Circuit Rule 28A(i)[41] which states that "[u]npublished opinions are not precedent . . . ."[42] Rejecting the taxpayer's contention that this earlier decision did not bind them, the Eighth Circuit panel held that the "portion of Rule 28A(i) that declares that unpublished opinions are

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[38] 223 F.3d 898 (8th Cir. 2000), *vacated as moot on other grounds by* 235 F.3d 1054 (8th Cir. 2000).

[39] Only one article, to my knowledge, considers in any depth the constitutional argument against restricted citation. Ironically, that article does not even consider the constitutional arguments put forth in *Anastasoff*. *See* Hinderks & Leben, *supra* note 21, at 215–17; *infra* notes 82–85 and accompanying text.

[40] *Anastasoff*, 223 F.3d at 899.

[41] *Id.*

[42] Eighth Circuit Rule 28A(i) reads in full:

> Citation of Unpublished Opinion. Unpublished opinions are not precedent and parties generally should not cite to them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. A party who cites an unpublished opinion in a document must attach a copy of the unpublished opinion to the document. A party who cites an unpublished opinion for the first time at oral argument must attach a copy of the unpublished opinion to the supplemental authority letter required by FRAP 28(j). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

8TH CIR. R. 28A(i).

not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the 'judicial.'"[43]

The *Anastasoff* court based its holding on what some critics believe to be rather shaky constitutional ground.[44] The court began the rationale for its holding by laying out what it believed to be the principles of precedent. "Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties."[45] These principles of precedent, according to the court, "were well established and well regarded at the time this nation was founded."[46] Because the "Framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution,"[47] Rule 28A(i) (and presumably the other circuit rules that similarly negate the precedential effect of unpublished decisions) is unconstitutional because it "purports to expand the judicial power beyond the bounds of Article III."[48]

The *Anastasoff* court advanced two different propositions in support of its contention that the doctrine of precedent infused the considerations of the authors of the Constitution. First, the court quoted Blackstone,[49] among others, to establish the fact that precedent was an accepted doctrine among law practitioners and judges by the time the Constitution was written.[50] The court reasoned that

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[43] *Anastasoff*, 223 F.3d at 899.

[44] Judge Alex Kozinski of the Ninth Circuit, who recently co-authored an article defending the Ninth Circuit's practice of refusing to allow lawyers to cite to memorandum dispositions, stated that "[a]s a matter of constitutional doctrine it's hogwash." *Swift En Banc Review Expected of Case Treating Unpublished Opinions as Precedent*, 69 U.S.L.W. 2227 (Oct. 24, 2000). Harvard law professor Laurence Tribe called the decision "inconsistent with the very notion of what the judicial power under the Constitution presupposes and means." *Id.*

[45] *Id.* at 899–00 (citation omitted).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] One of the criticisms of the opinion is that it cites no modern authority. *See Swift En Banc Review Expected*, *supra* note 44, at 2228.

[50] Anastasoff v. United States, 223 F.3d 898, 900 (2000). For an overview of the influence Blackstone's *Commentaries* had on the early American bar, especially with regard to legal education, see CRAIG EVAN KLAFTER, *St. George Tucker and the Influence of Blackstone's Commentaries on American Legal Education*, *in* REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL THOUGHT 31–50 (1993). Klafter states that the "leaders of the post-Revolutionary American Bar turned to the *Commentaries*, not so much as a treatise on law, but as a model for developing American systems of legal education." *Id.* at 31. Although acknowledging that the *Commentaries* occupied a preeminent position in the legal community of the newly-formed nation, *id.* at 32, Klafter notes that this preeminence did not translate into wholehearted acceptance. *Id.* at 36–37. Thomas Jefferson, among others, "spearheaded a campaign to drastically limit Blackstone's influence in America." *Id.* at 37.

because lawyers constituted a large proportion of the Constitutional Congress,[51] they also must have been imbued with this understanding of precedent.[52] Second, the court contended that through the writings of Sir Edward Coke and others, the architects of the Constitution were favorably impressed with the idea that precedent was "the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past struggles for liberty."[53]

Having expanded its view that the doctrine of precedent was well-established at the time of the writing of the Constitution, the *Anastasoff* court next addressed the grounds on which precedent was justified. Noting that "[m]odern legal scholars tend to justify the authority of precedents on equitable or prudential grounds," the court stated that "on the eighteenth-century view (most influentially expounded by Blackstone), the judge's duty to follow precedent derives from the nature of the judicial power itself."[54] Relying heavily on Blackstone's *Commentaries*, the court explained that the "judicial power to determine law is a power only to determine what the law is, not to invent it. Because precedents are the 'best and most authoritative' guide of what the law is, the judicial power is limited by them."[55]

Furthermore, the court found that precedent was also indispensable to maintaining the "separation of legislative and judicial power."[56] Looking to Blackstone once again, the court stated that precedent ensures that "judges must observe established laws, as that which separates it from the 'legislative' power."[57] The court declared that the "Framers accepted this understanding of judicial power . . . and the doctrine of precedent implicit in it."[58] Because they accepted this, the "Framers thought that, under the Constitution, judicial decisions

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[51] *Anastasoff*, 223 F.3d at 900 n.4.

[52] *Id.* at 900. At least one author seems to call into question this understanding of precedence. Klafter states that after the Revolution, "[t]he movement to modify the doctrine of *stare decisis* took place throughout the United States." CRAIG EVAN KLAFTER, *The Redaction of a Modified Doctrine of Stare Decisis into American Legal Practice, 1782–1830*, *in* REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL THOUGHT 68 (1993). This modified doctrine of stare decisis initially "provided that precedents established by American courts should be strictly adhered to while permitting English precedents to be questioned against the standards of utility, logic, morality and conflicting American law and policy." *Id.* at 92. However, "[a]s attorneys and judges became more familiar with the use of this method, they also developed a willingness to question domestic precedents against the powerful comparative standards of morality and constitutional law." *Id.* at 93.

[53] *Anastasoff*, 223 F.3d at 900.

[54] *Id.* at 901. The court noted at this point that "Blackstone's great influence on the Framers' understanding of law is a familiar fact." *Id.* at 901 n.8. For a somewhat contrary view, see *supra* note 50 and accompanying text.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* at 901–02.

would become binding precedents in subsequent cases."[59] The court went on to cite both Madison and Hamilton in support of this proposition.[60]

Later in the opinion, the court carefully laid out what was *not* being decided. First, the court made it clear that the decision was not about restricted publication rules,[61] noting that "[t]he question presented here is not whether opinions ought to be published, but whether they ought to have precedential effect, whether published or not."[62] Nor was it advocating, the court stated, "some rigid doctrine of eternal adherence to precedents."[63] Cases could be overturned "if the reasoning of the case is exposed as faulty, or if other exigent circumstances justify it," but when they were, "[t]he precedent from which we are departing should be stated, and our reasons for rejecting it should be made convincingly clear."[64]

Before concluding, the court also addressed the practical effect of what they were holding. The court acknowledged that many judges feel restricted citation rules are a necessity because of their heavy caseloads. Addressing those who argue that "[w]e do not have enough time to do a decent job . . . to justify treating every opinion as a precedent[,]" the court declared that "[i]f this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only."[65] Instead, the solution is to "create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price still must be paid."[66]

B. *A Critique of the* Anastasoff *Decision*

The *Anastasoff* court's decision to base its opinion on the Framers' understanding of precedent is both troublesome and curious. It is debatable whether the court is correct that the Framers did indeed intend to circumscribe the judiciary's power by demanding adherence to the doctrine of precedent. Even if true, the Framers' conception of the federal court system was markedly different from the court system that exists today. At a minimum, this raises the question of how germane the Framers' intent is to resolving a problem that was unforeseen at the time. In addition, the opinion fails to examine the Supreme Court's discussion of precedent which undercuts the *Anastasoff* court's contention that the doctrine is constitutionally required. Finally, the court apparently either failed to consider, or considered and rejected, several other possible constitutional attacks on rules such

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[59] *Id.* at 902.
[60] *Id.*
[61] *Id.* at 904.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 904–05.
[65] *Id.* at 904.
[66] *Id.*

as the Eighth Circuit's that restrict the precedential weight of unpublished opinions.

Although it is beyond the scope of this note to assess whether the *Anastasoff* court has in fact correctly determined and expounded upon the Framers' intent[67] with regard to precedent,[68] it can hardly be argued that the Framers could have imagined the federal court system as it is today. In establishing the judiciary, the Framers provided for "one supreme Court, and . . . such inferior Courts as the Congress may from time to time ordain and establish."[69] Furthermore, the federal

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[67] One immediate objection to the *Anastasoff* court's decision is that by focusing solely on the Framers' intent, the court perhaps failed to capture the intent that ultimately should guide the court's decision. It can be argued that the conception of precedent or Article III powers by those in the various states who actually ratified the Constitution is more relevant because these are the states that actually enacted the Constitution. If one accepts the views of these ratifiers as indicative of general public conceptions, then perhaps this is enough. Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 677 (1991); *see* H. Jefferson Powell, *The Original Understanding of Original Intent*, *in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 53, 54–55 (Jack N. Rakove ed., 1990) (stating that "[a]s understood by its late eighteenth- and early nineteenth-century proponents, the original intent relevant to discourse was not that of the Philadelphia framers, but rather that of the parties to the constitutional compact—the states as political entities"). In determining intent, however, others would go further and urge that "what counts is what the public understood." ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990). To ascertain this intent, one would need to consult "secondary materials, such as debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like." *Id.* For those who believe that the intent that counts is something more than that of the Framers of the Constitution, the *Anastasoff* opinion fails miserably.

[68] Several recent articles have examined the historical basis of stare decisis. John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 520–25 (2000); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1571–78 (2000). The Harrison article specifically examines the *Anastasoff* court's historical analysis, concluding that the court "went badly wrong when it addressed the constitutional status of stare decisis." Harrison, *supra*, at 522. He concludes that "the force of precedent came, not from anything intrinsic to the judicial power, but from the common law rules of stare decisis." *Id.* Another recent commentary on the decision has called the court's historical analysis "unsatisfying" and "cursory." *Recent Cases, Constitutional Law—Article III Judicial Power—Eighth Circuit Holds That Unpublished Opinions Must Be Accorded Precedential Effect*—Anastasoff v. United States, *223 F.3d 898 (8th Cir. 2000)*, 114 HARV. L. REV. 940, 943–44 (2001).

[69] U.S. CONST. art. III, § 1. As a result, Congress was permitted, though not required, to establish lower federal courts as they saw fit. This result has been termed the "Madisonian Compromise." Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 42. This compromise:

> marked an accommodation between Federalist forces, consisting of those who wanted to see the creation of some lower federal courts mandated by the Constitution itself, and Anti-

court system's jurisdiction was generally restricted,[70] with an assumption that the bulk of cases arising would be heard by the state courts.[71] Today, in addition to the Supreme Court mandated by the Constitution, the federal judiciary is comprised of over 100 other courts[72] with more than 800 judges sitting on the bench.[73] Moreover, federal jurisdiction has consistently been expanded.[74] Given that the Framers' conception of both the size and jurisdiction of the federal court system is so radically different than the modern reality, their intent regarding the doctrine of precedent is arguably only marginally, if at all, relevant to determining the constitutionality of methods devised to cope with a situation they did not foresee.[75]

> Federalists, who preferred that the only constitutionally required federal court be the Supreme Court and who would have left to the state courts the trial of Article III cases and controversies.

Id.

[70] *See* U.S. CONST. art. III, § 2, cl. 1. This, too, is attributable to the opposing views manifested in the Madisonian Compromise.

[71] When debating the necessity of having lower federal courts, some of the delegates found them unnecessary, "believ[ing] that the existing state courts could fulfill the role of the inferior or lower federal courts." Michael L. Wells & Edward J. Larson, *Original Intent and Article III*, 70 TUL. L. REV. 75, 85 (1995).

[72] There are twelve regional courts of appeals, one court of appeals for the federal circuit, and ninety-four district courts, as well as bankruptcy courts, the Court of Federal Claims, and the Court of International Trade. This figure does not include courts and other judicial entities outside the judiciary branch such as military courts, the U.S. Tax Court, the Court of Veterans Appeals, and other administrative agencies and boards such as the National Labor Relations Board.

[73] 28 U.S.C. § 44 (1994) (179 court of appeals judgeships authorized); *id.* § 133 (651 district court judgeships authorized).

[74] *See, e.g.*, William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 723 (noting that "there have been 202 new laws created by Congress in the last twenty years that have added to the workload of the federal courts").

[75] Indeed, the authors of one article contend "it is not appropriate to allow the Framers' aims to govern the constitutional issues in federal courts law today." Wells & Larson, *supra* note 71, at 94. They continue:

> Originalism may be an appropriate interpretive technique when the historical actors embraced a general principle of enduring value that may then be applied or adapted to our circumstances today, such as the First Amendment's freedom of religion or the Fourth Amendment's guarantee against unreasonable search and seizure. By the same token, *originalism is less attractive when changes in society render the decisions made, and the considerations that contributed to those decisions, irrelevant to modern conditions.* Most of the factors that mattered to the Framers on both sides of the debate over Article III simply did not involve issues that to them were general principles of enduring value. The [F]ramers of Article III seem to have made temporal political compromises, such as the Madisonian Compromise on lower federal courts, critical to the success of their project but devoid of lasting significance to themselves or others. Indeed, they all but invited future experimentation. Thus, even if one could identify with confidence the terms of the compromises that underlay Article III, the case for treating it as though it were an

The *Anastasoff* opinion also fails to address previous Supreme Court discussions of the doctrine of precedent indicating that, rather than being constitutionally required, it is a "principle of policy."[76] Although these discussions are not, of course, conclusive as to the constitutionality of these rules, they are indicative of the Court's conception of precedent. The Court on several occasions has indicated that "[s]tare decisis[77] is not an inexorable command."[78] While the Court has always recognized that "*stare decisis* embodies an important social policy,"[79] it is not a "mechanical formula of adherence to the latest decision."[80] Instead, the Court has emphasized that the rule of stare decisis "is not inflexible."[81] Underscoring the Court's belief that the doctrine of precedent is not constitutionally required, the Court has stated that "[w]hether [stare decisis] shall be followed or departed from is a question entirely within the discretion of the court . . . ."[82]

Finally, the *Anastasoff* court's decision to base its ruling on the Framers' intent rather than perhaps more apparent constitutional provisions is curious. The First Amendment and the Due Process and Equal Protection Clauses all appear to offer more plausible grounds upon which to rest a constitutional argument against rules prohibiting citation to unpublished opinions.[83] Under the First Amendment,

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> immutable constitutional principle that should control current federal court law remains to be made.

Id. at 94–95 (emphasis added).

Justice William O. Douglas also regarded this tendency to "revere past history and accept what was once written" as problematic. WILLIAM O. DOUGLAS, STARE DECISIS 9 (1949). To him, judges who adhered to stare decisis in constitutional matters were "let[ting] men long dead and unaware of the problems of the age in which he lives do his thinking for him." *Id.*

[76] Helvering v. Hollock, 309 U.S. 106, 119 (1940). Two recent articles argue that Congress has the power to modify or perhaps even abrogate the doctrine of precedent. Harrison, *supra* note 68, at 504–05; Paulsen, *supra* note 68, at 1540. Both authors find this power in the Necessary and Proper Clause of the Constitution. Harrison, *supra*, at 531; Paulsen, *supra*, at 1567.

[77] The doctrine of precedent and stare decisis are generally considered synonymous. *See* BLACK'S LAW DICTIONARY 1414 (7th ed.) (defining stare decisis as "[t]he doctrine of precedent").

[78] Payne v. Tennessee, 501 U.S. 808, 828 (1991); *see* United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 856 (1996) ("*Stare decisis* is a 'principle of policy,' and not 'an inexorable command.'") (citations omitted); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting) ("*Stare decisis* is not, like the rule of *res judicata*, a universal, inexorable command.").

[79] Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970) ("Very weighty considerations underlie the principle of [stare decisis]."); *Helvering*, 309 U.S. at 119; *see Burnet*, 285 U.S. at 406 (Brandeis, J., dissenting) ("*Stare decisis* is usually the wise policy.").

[80] *Helvering*, 309 U.S. at 119; *Payne*, 501 U.S. at 828.

[81] *Burnet*, 285 U.S. at 405–06 (Brandeis, J., dissenting); Hertz v. Woodman, 218 U.S. 205, 212 (1910).

[82] *Burnet*, 285 U.S. at 406 (Brandeis, J., dissenting); *Hertz*, 218 U.S. at 212.

[83] *See* Hinderks & Leben, *supra* note 21, at 215–17.

for example, it could be argued that rules that restrict citation to unpublished opinions impinge upon the freedom of speech.[84] Under the Due Process Clause, one might argue that prohibiting the citation of unpublished opinions violates litigants' rights to a fair trial.[85] Finally, restricted citation rules might violate the Equal Protection Clause in that the various circuit rules treat similarly-situated litigants differently based on where their suit is brought.[86]

Any of these three constitutional arguments appear more cogent than the historical argument set forth by the *Anastasoff* court. However, given the fact that these rules were promulgated by the circuit courts and that they have been in effect for over twenty-five years, a successful challenge on any of these grounds appears doubtful. As for the *Anastasoff* opinion, its constitutional underpinnings are unstable at best. The court's findings as to the Framers' intent with regard to the operation of precedent are historically debatable. In addition, the Framers' conception of the judiciary is so markedly different from modern practice that their intent is arguably irrelevant. Furthermore, the *Anastasoff* court's description of the Framers' intent is in direct conflict with the Supreme Court's continued articulation of precedent as being a matter of policy rather than a constitutional requirement. Given these infirmities, the *Anastasoff* opinion fails to make a convincing case that restricted citation rules are unconstitutional.

IV. CIRCUIT RULES RESTRICTING PUBLICATION AND CITATION TO UNPUBLISHED OPINIONS

A. *Who Decides Whether to Publish?*

As an initial matter, the various circuits have adopted explicit or implicit presumptions either for or against publication. For example, the First Circuit's

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[84] *See id.*; Richard L. Neumeier, *Unpublished Opinions*, 17 A.B.A. SEC. TORT & INS. PRAC. 22, 25, 40 (1988). Neumeier states:

> Rules or case law which prohibit counsel from disclosing a prior decision of a court are probably unconstitutional because of cases which held that disciplinary rules which precluded attorneys from making truthful statements about fees or their areas of practice are unconstitutional. Under the reasoning of these cases it is difficult to see how counsel can be prohibited from making truthful statements about prior decisions of appellate courts. Such decisions are obviously a matter of public record, and bringing them to the attention of other judges seems protected by the First Amendment.

Id.

[85] Hinderks & Leben, *supra* note 21, at 217.

[86] *See id.* Hinderks and Leben state that to withstand an equal protection challenge, the government would need to set forth a substantial government interest to justify the differing treatment of litigants by the various courts, which they do not believe the government could do. *Id.* They do note, however, that "given that [restricted citation rules] have been adopted by the very courts who would decide the issue, it seems imprudent to assume that the rules would be easily struck down." *Id.*

rule explicitly states that "the court thinks it desirable that opinions be published."[87] In contrast, the Seventh Circuit just as plainly has a presumption against publication.[88] Other circuits, although probably having informal presumptions one way or the other, are more circumspect in announcing their policies. The Eighth Circuit, for example, opines that "[i]t is unnecessary for the Court . . . to publish every opinion."[89] This attitude appears to represent a majority of the courts.

Regardless of which presumption regarding publication that a circuit court operates under, each circuit must designate who determines whether an opinion will be published. Once again, there is much variation among the courts as to whom this decision-making authority is delegated. The First, Second, Fifth, Sixth, and Federal Circuits' publication rules are written so that any judge can ensure that a particular opinion is published.[90] The Third, Seventh, and Eleventh Circuits (and presumably the Eighth and Ninth) allow the determination to be made by a majority of the panel.[91] In a slight twist to the Third Circuit rule, the Fourth Circuit also allows the author of the opinion to force publication.[92] The Tenth Circuit rule provides only that if the decision under review has been published, then the court's decision will "ordinarily" be published.[93] Finally, the D.C. Circuit gives no indication of who makes the decision on whether the opinion meets any

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[87] 1ST CIR. LOC. R. 36(b)(1); *see* 5TH CIR. R. 47.5.2 ("An opinion shall be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication."); D.C. CIR. R. 36 ("It is the policy of this court to publish opinions . . . that have general public interest.").

[88] 7TH CIR. R. 53(a) ("It is the policy of the circuit to reduce the proliferation of published opinions."); *see* 11TH CIR. R. 36-2 ("An opinion shall be unpublished unless a majority of the panel decides to publish it.").

[89] 8TH CIR. APP. I.

[90] *See* 1ST CIR. R. 36(b)(2)(B)–(C). These rules provide that a unanimous decision will be published, even though the author of the opinion believes it should not be, if any judge so desires. The rule further provides that in cases with either a dissent or concurrence, the opinion will be published unless all participating judges decide otherwise. 2D CIR. LOC. R. 0.23; 5TH CIR. R. 47.5.2; 6TH CIR. R. 206(b); FED. CIR. R. 47.6(b).

[91] 3D CIR. APP. 5.3 (providing also in 3D CIR. APP. 5.1 that a majority of the active judges may compel publication); 7TH CIR. R. 53(d)(1); 8TH CIR. APP. I.; 9TH CIR. R. 36-2; 11TH CIR. R. 36-2 (presuming opinion will be unpublished unless majority of panel agrees to publish). The Eighth Circuit rule says only that "[t]he Court or a panel will determine which of its opinions are to be published." This presumably means that the decision will be made by majority vote. Interestingly, the Seventh Circuit rule, although acknowledging that any federal judge has the right to have an opinion published, explicitly discourages the exercise of such right. 7TH CIR. R. 53(d)(2). In contrast, the Eighth Circuit rule explicitly acknowledges and presumably approves of the judges in this circuit exercising this right. The Ninth Circuit rule is completely silent as to who will make the publication determination. Presumably, a majority of the panel makes the decision.

[92] 4TH CIR. LOC. R. 36(a).

[93] 10TH CIR. R. 36.2.

of the stated criteria for publication.[94]

Several circuits further provide that either a party to the action or, in some cases, other persons may petition the court to publish a decision after it is rendered.[95] The Fourth, Fifth, and Eleventh Circuits limit the availability of this option to those more directly involved with the case at bar.[96] The Fourth Circuit provides that only counsel to the parties may move for such a change in publication status.[97] Expanding slightly on this rule, the Fifth Circuit allows "any judge of the court or any party" to make such a request.[98] The Eleventh Circuit provides that either the panel itself or a party may move for reconsideration of publication status, but only "before the mandate has issued."[99]

The other circuits that explicitly permit reconsideration of the publication decision of the court are more liberal in whom they allow to move for such an order. The First Circuit allows "[a] party or other interested person" to move for publication of an unpublished decision.[100] Perhaps a little more liberal, at least theoretically, is the Seventh Circuit, which allows "[a] person" to move for reconsideration of a publication decision.[101] Finally, although allowing any person to petition for reconsideration of a publication decision, both the District of Columbia and Federal Circuits severely restrict the amount of time a person has to make such request.[102]

B. *Criteria for Publication*

A second important aspect regarding the decision of whether to publish an opinion is what criteria the decision-maker will utilize. Like the determination of *who* will decide whether to publish, the rules vary as well in establishing what

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[94] D.C. CIR. R. 36(a)(2).

[95] 1ST CIR. LOC. R. 36(b)(2)(D); 4TH CIR. LOC. R. 36(b); 5TH CIR. R. 47.5.2; 7TH CIR. R. 53(d)(3); 11TH CIR. R. 36-3; D.C. CIR. R. 36(d).

[96] 4TH CIR. LOC. R. 36(b); 5TH CIR. R. 47.5.2; 11TH CIR. R. 36-3.

[97] 4TH CIR. LOC. R. 36(b).

[98] 5TH CIR. R. 47.5.2. The decision of the panel upon reconsideration to publish must be unanimous in order to change the publication status.

[99] 11TH CIR. R. 36-3. This circuit also requires a unanimous decision to change the publication status.

[100] 1ST CIR. LOC. R. 36(b)(2)(D). "Interested person" is not defined.

[101] 7TH CIR. R. 53(d)(3). One imagines that in reality the movant may well need to wedge himself into the "interested person" category of the First Circuit rule in order to get more than a cursory examination from the court.

[102] *Compare* D.C. CIR. R. 36(d) (thirty days), *with* FED CIR. R. 47.6(c) (sixty days). The D.C. Circuit makes clear that "[s]uch motions are not favored and will be granted only for compelling reasons." D.C. CIR. R. 36(d). The Federal Circuit rule requires that a person moving for reconsideration notify both the court and any parties that would be affected should the reconsideration be granted. The rule specifically provides that "[p]arties to pending cases who have a stake in the outcome of a decision to make precedential must be given an opportunity to respond." FED CIR. R. 47.6(c).

criteria the decision-maker will use to determine whether an opinion should be published. This variation runs the gamut, from little or very general formal criteria to a detailed pronouncement on which to base the decision.

The Second, Third, Tenth, Eleventh, and Federal Circuits have adopted this first approach. Each of these circuits' rules pronounce in very general terms the standards by which the circuit judges determine whether an opinion will be published. In the Second Circuit, an opinion will not be issued when "no jurisprudential purpose would be served by a written opinion."[103] The Third Circuit provides for publication where the opinion "has precedential or institutional value."[104] The Tenth Circuit rule provides that a published opinion is not necessary when "the case does not require application of new points of law that would make the decision a valuable precedent."[105] Curiously, the Eleventh Circuit, although providing for unpublished opinions,[106] apparently provides no guidance on what standards should be used to determine whether an opinion is published.[107] Finally, the Federal Circuit provides that an opinion will not be published when a unanimous panel determines that the opinion would "not add[ ] significantly to the body of law."[108]

In marked contrast, the rest of the circuits offer more detailed criteria for determining whether an opinion should be published. In many respects, the

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[103] 2D CIR. LOC. R. 0.23. The Second Circuit is unusual among the circuits in that it has no "unpublished opinions." Instead, the court utilizes what is termed a "summary order" that apparently functions in many cases as an unpublished opinion. *See id.* Indeed, a quick survey of recent summary orders issued by the circuit reveal that in many cases the court goes beyond what one would consider a summary order and provides a brief recitation of facts and/or analysis. *See, e.g.*, Leather v. Eyck, No. 00-7703(L), 2001 U.S. App. LEXIS 983 (2d Cir. Jan. 24, 2001); South Park Ass'n. v. Renaulli, No. 00-7656, 2001 U.S. App. LEXIS 982 (2d Cir. Jan. 23, 2001). This mode of treatment is authorized by the rules. 2D CIR. LOC. R. 0.23 ("Where disposition is by summary order, the court may append a brief written statement to that order."). However, other recent summary orders by the Second Circuit more closely resemble the "traditional" form in that they summarily render judgment with little or no rendition of facts or analysis. *See, e.g.*, United States v. Loudon, No. 00-1581, 2001 U.S. App. LEXIS 900 (2d Cir. Jan. 23, 2001); Ushodaya Enterprises v. V.R.S. International, Inc., No. 00-7574, 2001 U.S. App. LEXIS 811 (2d Cir. Jan. 22, 2000).

[104] 3D CIR. APP. 5.2. It is irrelevant whether the opinion is signed or per curiam. *Id.*

[105] 10TH CIR. R. 36.1. As mentioned previously, the Tenth Circuit allows its publication decisions to be driven in part by the courts whose decisions it is reviewing. The Tenth Circuit "ordinarily designates its disposition for publication" if "the opinion of the district court, an administrative agency, or the Tax Court has been published." 10TH CIR. R. 36.2.

[106] 11TH CIR. R. 36-2. There is a presumption in favor of unpublished opinions. *See supra* note 55.

[107] Perhaps the judges are to extrapolate from the Eleventh Circuit's Rule 36-1. This rule essentially provides that where the findings of fact and conclusions of law by the initial trier are not reversible and "an opinion would have no precedential value," the court may affirm or enforce the judgment or order without issuing an opinion. 11TH CIR. R. 36-1.

[108] FED. CIR. R. 47.6(b).

various standards are similar.[109] All of these circuits in some form provide for publication where an opinion "establishes, alters, modifies or clarifies a rule of law."[110] All but one of these circuits explicitly provide for publication of opinions that address issues of public interest.[111] Most of these circuits mandate publication when an opinion either creates or resolves a conflict among the circuits.[112]

Other criteria are less uniformly recognized throughout those circuits giving a more detailed exposition of publication criteria. Four of the circuits either require or encourage publication of an opinion when it "criticizes or questions existing law."[113] Several circuits provide for publication of an opinion that "applies an

[109] Because the First Circuit has a presumption in favor of publishing opinions, its criteria are stated in the negative—namely, if an opinion does not alter existing law, for instance, then it will be unpublished. This, of course, has no substantive effect on the criteria themselves.

[110] 9TH CIR. R. 36-2(a); *see, e.g.*, 7TH CIR. R. 53(c)(1)(i) (publishing an opinion when it "establishes a new, or changes an existing rule of law"). Many of the circuits limit the application of this standard to only those opinions that establish or modify rules within the circuit. *See, e.g.*, 4TH CIR. R. 36(a)(i) (stating that an opinion will be published if "[i]t establishes, alters, modifies, clarifies, or explains a rule of law *within* this Circuit" (emphasis added)); 8TH CIR APP. 4(a) (encouraging publication of an opinion when it "establishes a new rule of law or questions or changes an existing rule of law in *this* Circuit" (emphasis added)).

[111] *See, e.g.*, 6TH CIR. R. 206(a)(3) (providing for publication of an opinion that "discusses a legal or factual issue of continuing public interest"); D.C. CIR. R. 36(a)(2)(G) (allowing publication when an opinion "warrants publication in light of other factors that give it general public interest"). The Eighth Circuit rule is more inclusive in that it also encourages publication when an opinion involves a "legal or factual issue of continuing or unusual public *or legal interest*." 8TH CIR. APP. 4(d) (emphasis added). Although most of the circuit rules can be read to permit publication when either legal or factual issues of "general public interest" are present, the Fourth Circuit apparently limits this criterion to legal issues. 4TH CIR. R. 36(a) (publishing an opinion when it "involves a legal issue of continuing public interest). The First Circuit rule does not explicitly contain this criterion. However, as noted earlier, this circuit has a presumption in favor of publication and the criteria stated in the rule enumerate circumstances when an opinion should *not* be published. Therefore, one could presume that this criterion is implicit in the First Circuit.

[112] *See, e.g.*, 5TH CIR. R. 47.5.1(d) (publishing an opinion when it "[c]reates or resolves a conflict of authority either within the circuit or between this circuit and another"); 7TH CIR. R. 53(c)(1)(iv)(C) (requiring publication when an opinion "resolv[es] or creat[es] a conflict in the law"). The Eighth Circuit rule goes even further and strongly encourages publication when an opinion "is a new interpretation of or conflicts with a decision of a federal *or state* appellate court." 8TH CIR. APP. 4(b) (emphasis added). Given the interaction the federal courts have with state law under the *Erie* doctrine, this provision should further the recognition and resolution of such conflicts. Neither the First nor Ninth Circuits have this provision. Although the novel way in which the First Circuit rule is written probably explains the omission in that circuit, this omission in the Ninth Circuit seems curious. With this and several other omissions, it is possible to at least read this provision into the rule implicitly. However, such an important criterion should be explicitly provided for in the rules.

[113] 7TH CIR. R. 53(c)(1)(iii); *see* 8TH CIR. APP. 4(a) (encouraging publication when an opinion "questions . . . an existing rule of law . . ."); 9TH CIR. R. 36-2(c) (requiring publication if an opinion "[c]riticizes existing law"); D.C. CIR. R. 36(a)(2)(D) (publishing an opinion when it "criticizes or questions existing law").

established rule to a novel fact situation."[114] Some of the circuits either require or encourage publication when an opinion "contains a historical review of a legal rule that is not duplicative."[115] A few of the circuits expect an opinion to be published if it "calls attention to an existing rule of law that appears to have been generally overlooked."[116]

Finally, several of the circuits, in varying manners, allow for the publication decision to be driven by the actions of other courts that have considered a particular case. The Fifth, Sixth, Seventh, and Ninth Circuits explicitly provide that an opinion will be published if "it is a decision that has been reviewed by the United States Supreme Court."[117] Most of the circuits having detailed criteria for publication provide that an opinion will be published if it reverses or affirms on different grounds a published opinion of a district court or agency.[118] The Sixth Circuit provides as an additional, independent consideration whether the opinion

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[114] 6TH CIR. R. 206(a)(1); *see* 5TH CIR. R. 47.5.1(b) (mandating publication of an opinion if it "[a]pplies an established rule of law to facts significantly different from those in previous published opinions applying the rule"); 8TH CIR. APP. 4(c) (encouraging publication when an opinion "applies an established rule of law to a factual situation significantly different from that in published opinions"). By negative implication, the First Circuit's rule also explicitly supports publication in this circumstance. 1ST CIR. LOC. R. 36(b)(1) (providing that an opinion will *not* be published when it "does not . . . apply an established rule to novel facts").

[115] 4TH CIR. LOC. R. 36(a)(iv); *see* 5TH CIR. R. 47.5.1(c) (providing for publication when an opinion "[e]xplains, criticizes, or reviews the history of existing decisional or enacted law"); 7TH CIR. R. 53(c)(iv)(A)–(B) (publishing an opinion when it provides "a historical review of the law" or "describ[es] legislative history"); 8TH CIR. APP. 4(f) (encouraging publication of an opinion that is a "significant contribution to legal literature through historical review").

[116] D.C. CIR. R. 36(a)(2)(C); *see* 5TH CIR. R. 47.5.1(a) (same); 9TH CIR. R. 36-2 (same).

[117] 6TH CIR. R. 206(a)(7); *see* 5TH CIR. R. 47.5.1(f) (requiring publication when an opinion is "rendered in a case that has been reviewed previously and its merits addressed by an opinion of the United States Supreme Court"); 7TH CIR. R. 53(c)(vi) (mandating publication when an opinion is issued "pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of the Court"); 9TH CIR. R. 36-2(f) (publishing opinion if it is a "disposition of a case following a reversal or remand by the United States Supreme Court").

[118] *See* 5TH CIR. R. 47.5.1 (providing that an opinion may be published if it "reverses the decision below or affirms it upon different grounds"); 7TH CIR. R. 53(c)(1)(v) (requiring publication if an opinion "reverses a judgment . . . when the lower court or agency has published an opinion supporting the judgment"); 8TH CIR. APP. 4(c) (encouraging publication when an opinion "does not accept the rationale of a previously published opinion in that case"); 9TH CIR. R. 36-2(e) (mandating publication of an opinion where "there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case"); D.C. CIR. R. 36(a)(2)(F) (requiring an opinion to be published if it "reverses a published agency or district court decision, or affirms a decision of the district court upon grounds different from those set forth in the district court's published opinion"). Although reversal of a lower court decision is a factor in the Sixth Circuit's criteria, the rule does not require that the decision below have been published. 6TH CIR. R. 206(a)(5).

reviewed has been published, regardless of the district court's disposition.[119]

C. *Citation of Unpublished Opinions*

The final provisions included in circuit rules governing unpublished opinions are restrictions on citation to those opinions. As with the rules governing the publication status of an opinion, the circuit rules vary widely in regulating the citation of unpublished opinions. The various rules range from prohibiting citation altogether except in related cases to allowing unlimited citation but only for persuasive purposes. Yet all of the rules have one thing in common: none of them lend *binding* precedential authority to unpublished opinions.

Five of the circuit courts prohibit citation to unpublished opinions in unrelated cases.[120] However, the wording of several of these circuit court rules seems problematic. For instance, the Second Circuit rule provides that unpublished opinions "shall not be cited *or otherwise used* in unrelated cases before this *or any other court*."[121] First, no explanation of the cryptic words "or otherwise used" is provided.[122] Second, although defensible,[123] the court's

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[119] 6TH CIR. R. 206(a)(6).

[120] 1ST CIR. LOC. R. 36(b)(2)(F) ("Unpublished opinions may be cited only in related cases."); 2D CIR. R. 0.23 (providing that open court dispositions and summary orders, which are Second Circuit analogues to unpublished opinions, "shall not be cited or otherwise used in unrelated cases"); 7TH CIR. R. 53(b)(2)(iv) (decreeing that unpublished orders, which are Seventh Circuit analogues to unpublished opinions, "shall not be cited or used as precedent" except for the purposes of "support[ing] a claim of res judicata, collateral estoppel or law of the case"); 9TH CIR. R. 36-3(b) (prohibiting citation of unpublished "dispositions and orders" except "when relevant under the doctrine of law of the case, res judicata, or collateral estoppel," to establish "double jeopardy, sanctionable conduct, notice, entitlement to attorney's fees, or the existence of a related case," or to "demonstrate the existence of a conflict among opinions, dispositions, or orders" when seeking publication of an unpublished disposition or when petitioning for either a rehearing by the panel or the court en banc); D.C. CIR. R. 28(c) (allowing counsel to refer to unpublished dispositions only "when the binding or preclusive effect of the disposition, rather than its quality as precedent, is relevant"); FED. CIR. R. 47.6(b) (providing that "any opinion or order [not published] must not be employed or cited as precedent" but not precluding "assertion of claim preclusion, issue preclusion, judicial estoppel, law of the case, or the like"). The Second and Ninth Circuit rules (as well as the Eighth, Eleventh, and possibly the Tenth, discussed *infra*) by their own terms apply only to unpublished opinions issued by the respective circuit court. None of these rules provide further guidance on citation to unpublished dispositions of other courts. Although an important distinction, this note will not discuss how these respective circuits treat unpublished decisions emanating from outside the individual circuit court. Part V will take up this distinction in suggesting a uniform set of rules governing unpublished opinions and citation to them.

[121] 2D CIR. R. 0.23 (emphases added).

[122] One possibility is that the court, in response to concerns voiced by critics of such rules, see *supra* notes 29–37 and accompanying text, intended to prohibit counsel from utilizing these opinions to ferret out theories or distinguish trends in the court's decision-making. If so, this provision in the rule is especially problematic. First, the practical aspects of enforcing such a

prohibition on use of its unpublished opinions in other courts beyond its jurisdiction seems overreaching, if not unconstitutional.[124]

The D.C. Circuit has adopted a different, though still troubling, approach. Its rule somewhat ambiguously mandates that its unpublished opinions "are not to be cited as precedent"[125] and further extends this rule to "unpublished dispositions of district courts[ ] and to unpublished dispositions of other courts of appeals if those appellate courts have a rule similar to this one."[126] By prohibiting citation to *all* district court unpublished dispositions while barring citation of other circuit court

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prohibition seem daunting. The court would be hard-pressed to discern from what source a particular theory espoused by counsel may have come from and policing this provision would entail a waste of judicial resources. Second, the constitutional validity of such a prohibition seems particularly suspect, especially given the public access such documents typically enjoy. It is one thing for a court to limit what previously decided cases it will entertain. Prohibiting counsel from looking at these decisions as an aid to their own conceptualization of how to proceed goes far beyond this.

[123] One suspects the court added this provision to obviate exactly what this note finds problematic: the uneven application and standards of such rules throughout the various circuits.

[124] Of course, enforcement of this rule would depend in large part upon cooperation from these other courts outside the Second Circuit's jurisdiction. It would be rather draconian, not to mention impractical, for the court to keep track of how its unpublished opinions were being used outside the circuit and then haul the offender before the court to mete out punishment. As for the constitutionality of such a rule, it is at least debatable whether the court has the power to enforce a prohibition against conduct not occurring within its jurisdiction.

[125] D.C. CIR. R. 28(c). Given a literal reading, the question arises whether citation is prohibited altogether or whether counsel may cite the unpublished opinion as persuasive authority. Other circuit court rules explicitly separate the two distinct issues of whether an opinion is binding precedent and whether an opinion can be cited as persuasive authority. *See, e.g.*, 8TH CIR. R. 28A(i) ("[U]npublished opinions are not precedent and parties generally should not cite them. . . . Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion . . . would serve as well."). Given the wording in the rest of the rule, it appears that the D.C. Circuit intends to prohibit citation altogether. *See infra* note 126.

[126] D.C. CIR. R. 28(c). This portion of the rule raises the question of what exactly do the courts mean by precedent. *Black's Law Dictionary* discusses both binding and persuasive precedent. Binding precedent is "precedent that a court must follow" whereas persuasive precedent is "precedent that a court may either follow or reject, but that is entitled to respect and careful consideration." BLACK'S LAW DICTIONARY, 1195 (7th ed. 1999). Unlike the D.C. Circuit rule, a few of the circuit courts' rules explicitly state that they are barring the use of *binding* precedent. *See, e.g.*, 9TH CIR. R. 36-3(a); 10TH CIR. R. 36.3(A); 11TH CIR. R. 36-2. Other circuits negate this potential problem by avoiding the use of the word precedent. Instead, they frame their rules solely in terms of whether citation is permitted or not, evidently (and reasonably) assuming that the question of precedential weight will be resolved upon consideration of the source of the opinion. The D.C. Circuit rule here must mean persuasive precedent since all would agree that a district court opinion does not constitute binding precedent on a court of appeals. Of course, except for consideration of unpublished dispositions rendered by a panel of the circuit court or the court en banc, all other unpublished dispositions are necessarily merely persuasive precedent since the only other source of binding precedent on a circuit court is the United States Supreme Court.

opinions *only* when the rendering circuit court would also bar citation, litigants are faced with the prospect of being unable to use an unpublished district court opinion from another circuit solely because it wasn't taken up by that circuit court, even though that circuit court would allow citation of the unpublished district court opinion to it.

The Seventh Circuit rule moderates the D.C. Circuit approach somewhat. In addition to prohibiting citation of its own unpublished opinions, the court prohibits the citation of unpublished dispositions of *any* court if such citation would be prohibited in the *rendering* court.[127] Although still leading to disparate treatment of litigants among the various circuits, it at least avoids the uneven treatment of litigants based upon the level of review an opinion proposed to be cited has received.

Other circuits, although not explicitly prohibiting citation to unpublished opinions, do state that such citation is "disfavored."[128] Although "disfavored," however, each of these circuit courts allow citation to unpublished decisions in certain circumstances. Both the Fourth and Sixth Circuits allow such citation if "counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well."[129] The Eighth Circuit rule is similar, differing only in requiring that the unpublished decision have "persuasive value."[130] Like the Eighth Circuit rule, the Tenth Circuit rule also requires that an unpublished opinion have "persuasive value" and further requires that citation to such an opinion "assist the court in its disposition."[131]

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[127] 7TH CIR. R. 53(e). The rule provides that "no unpublished opinion or order of any court may be cited in the Seventh Circuit if citation is prohibited in the rendering court." *Id.* The court does permit citation to unpublished dispositions of any court, including its own, for the purposes of res judicata, collateral estoppel, or law of the case. 7TH CIR. R. 53(b)(2)(iv).

[128] 4TH CIR. LOC. R. 36(c) ("disfavored"); 6TH CIR. R. 28(g) ("disfavored"); 8TH CIR. R. 28A(i) ("parties generally should not cite [unpublished opinions]"); 10TH CIR. R. 36.3(B) ("disfavored"). Perhaps in response to critics of the current regime, but in any case responding to what can potentially seriously undermine it, the Fourth Circuit rule also specifically forbids citation of unpublished opinions *by* that court. 4TH CIR. LOC. R. 36(c). If attorneys see the court repeatedly citing unpublished opinions, they cannot help but discern that, no matter what the court says, these opinions do matter. The Fourth Circuit rule does, however, allow the court to override this restriction if "unusual circumstances" are present. *Id.* The Ninth Circuit is the only other court of appeals with a similar rule. That rule prohibits the court from citing its own unpublished opinions and orders except for the purposes of res judicata, collateral estoppel, law of the case and a few other specific exceptions. 9TH CIR. R. 36-3(b).

[129] 4TH CIR. LOC. R. 36(c); *see* 6TH CIR. R. 28(g) (same). If counsel does cite to an unpublished decision, both circuits require that the attorney serve copies of the decision on both the court and all parties. *Id.* Also, note once again the possible conflation of the two different meanings of precedent.

[130] 8TH CIR. R. 28A(i). By the use of the term "persuasive value," the court negates any possible confusion over exactly what "precedential value" means.

[131] 10TH CIR. R. 36.3(B)(1-2).

The Fifth Circuit rule establishes a dichotomy between those opinions issued before January 1, 1996, and those published on or after that date.[132] Although acknowledging that unpublished opinions that predate 1996 are "precedent," the rule further states that "because every opinion believed to have precedential value is published, such an unpublished opinion should normally be cited only when the doctrine of res judicata, collateral estoppel or law of the case is applicable."[133] As for those unpublished dispositions issued since 1996, the rule provides that they are "not precedent,"[134] yet acknowledges that they may be persuasive and hence "may be cited."[135] Although neither rule *prohibits* citation of unpublished decisions for their persuasive value regardless of date rendered, it seems inexplicable why the court would disfavor citation of opinions that predate 1996 while endorsing citation of opinions rendered thereafter.[136] Moreover, the decision to lend precedential authority to decisions rendered before 1996 and not to those after, while most likely constitutional,[137] appears arbitrary at best.

Finally, both the Third and Eleventh Circuits apparently sanction without reservation the citation of unpublished opinions for their persuasive value.[138] Although the Third Circuit makes no explicit provision for citation of unpublished opinions, it does provide for citation to "electronically transmitted decision[s]" and to "electronic citation systems."[139] The Eleventh Circuit rule,

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[132] 5TH CIR. R. 47.5.3, 47.5.4.

[133] 5TH CIR. R. 47.5.3.

[134] *Id.* The rule does allow courts to use unpublished cases as precedent to prove res judicata, collateral estoppel, law of the case, etc. 5TH CIR. R. 47.5.4.

[135] *Id.*

[136] The rule does specify that January 1, 1996, is the effective date for the amended rules. 5TH CIR. R. 47.5.3 n.1. Yet, this still does not explain why the court disfavors citation to earlier unpublished opinions while endorsing citation to unpublished opinions after this effective date.

[137] *See supra* notes 38–86 and accompanying text.

[138] 3D CIR. APP. 5.3; 3D CIR. L.A.R. 28.3; 11TH CIR. R. 36-2. Third Circuit Appendix 5.3 is entitled "Non-precedential Opinions" and provides that "[o]pinions which appear to have value only to the trial court or the parties are designated by the court as unreported and are not sent by the court for publication." 3D CIR. APP. 5.3. While this rule seems to make clear by its title that unpublished opinions are not precedent, it does not address the permissible citation to such opinions. However, when read together with Local Appellate Rule 28.3, it appears that citation is permitted. *See infra* note 139.

[139] 3D CIR. L.A.R. 28.3. The rule, in pertinent part, provides:

> Citations to federal decisions that have not been formally reported shall identify the court, docket number and date, and refer to the electronically transmitted decision. *Citations to . . . electronic citation systems[ ] shall not be used if the text of the case cited has been reported* in the United States Reports, the Federal Reporter, the Federal Supplement, or the Federal Rules Decisions."

Id. (emphasis added). Assuming the court was not being redundant, the first sentence apparently provides for citation to opinions that will be, but have not yet been, published while the second sentence appears to contemplate citation to opinions that will not be published. Alternatively, one could read these two sentences as complementary; one providing the format for citation of

while making clear that unpublished decisions are not "binding precedent," does provide for citation to them as "persuasive authority."[140]

V. STANDARDIZING CIRCUIT COURT RULES RESTRICTING THE PUBLICATION AND CITATION OF UNPUBLISHED OPINIONS

Thus far, this note has attempted to provide an overview of restricted publication and citation rules and the arguments set forth by both proponents and opponents of such rules. This note makes no claim to resolve whether such rules should be retained or abolished. Instead, because of the length of time such rules have been in effect and the lively debate still surrounding the issue, the rest of this note proceeds on the assumption that some type of restricted publication and/or citation rules will exist for the foreseeable future.[141] Hence, this section argues that such rules should be uniform throughout the circuits and presents a model for such a uniform rule that attempts, as best as possible, to address the concerns enunciated by those on both sides of the issue.

Whether one agrees with restricted publication and citation rules, most would concur that if such rules are to exist, it is unfair to litigants to have inconsistent standards among the circuits. Echoing the equal protection argument mentioned in Part III,[142] parties that litigate in only one circuit are unfairly treated when prohibited from citing to relevant case law that similarly-situated litigants in other circuits are able to utilize. For those parties that litigate in more than one circuit, the perceived fairness of the court system is called into question when they are able to rely on favorable case law in one circuit while being barred from presenting this favorable law in another circuit. Standardizing the rules restricting publication and citation would respond to the fundamental fairness concerns of those opposed to such rules by eliminating one source of disparity.

A. *Who Determines Publication Status?*

As an initial matter, a uniform publication rule should have a presumption in favor of publication.[143] Although stare decisis is probably not constitutionally

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opinions not yet reported and the other reminding counsel not to use this form of citation once a decision has been published. If so, this means that the Third Circuit has no formal rule regarding citation of unpublished opinions. In the absence of such a rule, one could make a presumption that the court did not intend to limit or prohibit citation of these opinions.

[140] 11TH CIR. R. 36-2.

[141] *See supra* Part IV. One commentator has concluded that "[i]n the absence of more fundamental reforms designed to ameliorate th[e] crush of cases, limited publication seems an inevitable palliative." Shuldberg, *supra* note 1, at 574.

[142] *See supra* note 86 and accompanying text.

[143] Numerous commentators have noted that "unpublished opinion" is really a misnomer in that many of them are published electronically. *See, e.g.*, Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2d 17, 18 (2000) ("The

required,[144] it is an important aspect of the legal system.[145] Because much of the United States legal system is so heavily driven by prior court decisions, a general presumption should exist that each decision has some value until and unless proven otherwise.[146]

With this presumption in favor of publication in mind, a uniform rule should permit any judge on the deciding panel to force publication. Such a provision would ensure that where there is a difference in opinion over the publication decision, the court would err on the side of publication. Moreover, a uniform rule should include a provision enabling a "majority of the active judges of the court"[147] to force publication as well. Although such a provision will likely seldom be used, it would allow judges more detached from the decision to evaluate the significance of the opinion. In addition, such a provision would act as a check on those panels that contain non-resident circuit judges.[148] Yet, by

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'unpublished opinion' debate . . . is badly misnamed, since there is really no such thing as an 'unpublished opinion' of a federal appellate court."). Designation of an opinion as unpublished, however, signifies that it will not be published in an official reporter, thereby achieving cost savings related to library and storage expenses. Many of the commentators are apparently upset because they believe that the "unpublished" designation is a proxy for "non-precedential." Indeed, this would be the case under the model rule proposed in this article, at least as far as restricting *binding* precedential authority. *See infra* note 165 and accompanying text. Although the current nomenclature does not appear to be causing any harm, perhaps the courts should be required to inscribe a new legend on unpublished opinions. Such a legend might read "Unpublished Opinion—Not *Binding* Precedential Authority (See Xth Cir. R. XX-X for permissible citation as persuasive authority)."

[144] *See supra* notes 54–82 and accompanying text.

[145] *See* Payne v. Tennessee, 501 U.S. 808, 827 (1992) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."); Helvering v. Hallock, 309 U.S. 106, 119 (1940) ("We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations."); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) ("*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."); *supra* note 68 and accompanying text.

[146] *See* 1ST CIR. LOC. R. 36(b)(1) ("In general, the court thinks it desirable that opinions be published and thus available for citation.").

[147] 3D CIR. APP. 5.1.

[148] In an article arguing for an expansion in the number of federal circuit court judges, it was stated that "[t]he days when a panel was made up of three active circuit judges are long gone." Richman & Reynolds, *supra* note 15, at 287. The article noted that today a circuit panel might include only one, or even no, active judge from the circuit. *Id.* (citing JUDITH A. MCKENNA, FEDERAL JUDICIAL CENTER, STRUCTURAL & OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 38 (1993)). The panel is instead filled with "senior judges, visiting judges from other circuits, and district judges." *Id.* While use of senior judges presents little problem because "[t]hey are wise in the folkways of the circuit," the use of visiting circuit judges and district judges are a different matter. *Id.* The authors noted two particular concerns. First, there is a "reluctance to let trial judges shape the development of the law." *Id.* Second,

requiring a majority of the judges not sitting on the panel to agree to force publication, this should ensure that external influences do not unduly interfere with the panel's publication determination.

Finally, a uniform publication rule should contain a provision allowing any person to request, for good cause, reconsideration of a court's publication decision.[149] Inclusion of such a provision recognizes that not every publication decision, in hindsight, will be correct[150] and provides a mechanism whereby such an erroneous decision can be rectified. The inclusion of a good cause requirement, meanwhile, should ensure that such petitions are relatively small in number and, therefore, impose little additional burden on the courts. Furthermore, there should be no time limitation on when such a request can be made.[151] Oftentimes, the significance of a particular decision becomes readily apparent only after a lapse of time and/or alteration of economic or social circumstances.

B. *Criteria for Publication*

A uniform publication rule should contain explicit criteria for determining when a publication should be published. Explicit criteria provide judges with objective standards by which to make a publication decision. In addition,

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visiting circuit judges disrupt the workings of the court by their "ignorance of, or disdain for, circuit precedent." *Id.*; *see also* Berman & Cooper, *supra* note 13, at 2030 n.17 (noting that in 1998, "nearly 25% of the judges participating in dispositions were either senior or visiting judges," and in the Second Circuit this ratio was almost 50%).

[149] *See, e.g.*, 7TH CIR. R. 53(d)(3). One commentator believes the "crux of the problem [with restricted publication rules]" is that "the decision makers are able to hinder public access to their decisions." James N. Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A. J. 1224, 1227 (1975). Gardner proposes a rule that would allow both the federal judges and members of the bar within a circuit to compel publication in order to maximize the "embarrassment potential." *Id.* This proposal goes both too far and not far enough. The proposal to allow members of the circuit bar to *compel* publication would allow unappointed persons to determine the law of a particular circuit. This is not acceptable. Yet Gardner's proposal would limit the right to seek publication only to those either sitting on the bench or practicing law within the circuit. There is no valid reason to limit the right to petition for publication only to those practicing within the circuit. Although admittedly it will be a fairly rare occurrence, attorneys in other jurisdictions, as well as pro se litigants and ordinary citizens, should have the right to petition the court system for such an order.

[150] One commentator opposed to restricted publication plans has noted that a "court is not especially privileged to determine the ultimate consequences of its actions." Pamela Foa, Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309, 313 (1977).

[151] Of the seven circuits that currently have a provision allowing for reconsideration of a publication decision, only the D.C. and Federal Circuits impose a time limit. The D.C. Circuit allows any person thirty days after judgment to move the court for publication of an unpublished decision. While allowing for petition outside this time frame, the rule stresses that such a motion is "not favored and will be granted only for compelling reasons." D.C. CIR. R. 36(d).

objective criteria will help ensure that publication decisions among the various circuits are uniform. Furthermore, the existence of independent standards should foster the belief in attorneys and in the general public that such decisions are being carried out in a reasoned and deliberate manner.

Under a uniform rule, an opinion should be published if it "[e]stablishes a new rule of law, alters[ ] or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked."[152] Few, if any, should object to these criteria with the possible exception of the final provision.[153] Its inclusion is worthwhile, however, because such a provision ensures that a rule of law does not unintentionally escape the consciousness of the legal community due to a lack of published opinions on the subject. Other criteria that should be incorporated in a uniform publication rule include that an opinion: (1) "involves a legal or factual issue of continuing or unusual public or legal interest;"[154] (2) "explains, criticizes, or reviews the history of existing decisional or enacted law" in a non-duplicative manner;[155] (3) "applies an established rule to a novel fact situation;"[156] and (4) "[c]reates or resolves a conflict of authority"[157] with a "decision of a federal or state appellate court."[158] The inclusion of each of these criteria provides a comprehensive list that should help ensure that only truly "routine" opinions are not being published.

Two other situations also merit publication of an opinion. First, a uniform rule should mandate publication of an opinion that is issued "pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court."[159] One would assume that any case the Supreme Court deems worthy of reviewing is important enough that a resulting opinion should be published. Second, an opinion should also be published when it "reverses a published agency or district court decision, or affirms a decision of the district court upon grounds different from those set forth in the district court's published opinion."[160] Although this provision allows a

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[152] 5TH CIR. R. 47.5.1(a).

[153] *But see* Boggs & Brooks, *supra* note 143, at 20 ("[A]s a matter of theory, it seems clearly wrong to say that courts should decide whether or not to publish opinions . . . based on their perceived 'general precedential significance.'") These authors, one of whom is a Sixth Circuit judge, contend that restricted publication and citation rules are justifiable solely on efficiency grounds. *Id.* at 19. They state that "[o]ne of the great puzzles of the unpublished opinion debate is why so many commentators believe this justification is not good enough." *Id.*

[154] 8TH CIR. APP. (4)(d).

[155] 5TH CIR. R. 47.5.1(c).

[156] 6TH CIR. R. 206(a)(1).

[157] 5TH CIR. R. 47.5.1(d).

[158] 8TH CIR. APP. (4)(b).

[159] 7TH CIR. R. 53(c)(1)(vi).

[160] D.C. CIR. R. 36(a)(2)(F); *see* Dragich, *supra* note 31, at 801 ("Summary reversals should never be issued. The parties, the lower court, and future litigants are entitled to an explanation of the error below.").

lower court, in certain instances, to effectively dictate the publication decision of the circuit court, it is a necessary concession of such authority.[161] The alternative would, under the restricted citation rules proposed,[162] result in an infirm or reversed district court opinion being more readily citable than the circuit court opinion that caused the infirmity.

C. *Citation of Unpublished Opinions*

A uniform rule regulating citation to unpublished opinions should fall somewhere in between the various rules now in effect within the circuits. A rule modeled after the Eleventh Circuit's rule[163] that allows unlimited citation—albeit only as persuasive authority—would negate a considerable amount of the savings such rules were implemented to provide. Yet a rule modeled after the First Circuit rule[164] that allows citation of unpublished opinions only in related cases seems too miserly, ignoring the possibility that an unpublished opinion might, in fact, have some direct bearing on the case at bar. What is needed is a rule that combines the virtues of both extremes while avoiding their vices.

First, a uniform rule should make clear that unpublished opinions are "not binding precedent,[165] except when relevant under the doctrines of law of the case,

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[161] *But see* Nichols, *supra* note 18, at 925–26. While Judge Nichols believes that "the proportion of reversed decisions left unpublished ought to be and usually is small," he states that "it is a rather wooden rule to say that all reversals must be published." *Id.* at 926. Still, he does believe that a "panel which refuses to publish a reversal should realize it is doing something anomalous and should consider carefully whether it is doing the right thing." *Id.*

[162] *See infra* Part V.C.

[163] 11TH CIR. R. 36-2.

[164] 1ST CIR. LOC. R. 36(b)(2)(F).

[165] The omission of the word "binding" in many of the circuit rules now in effect seems particularly glaring. *See* 5TH CIR. R. 47.5.3; 5TH CIR. R. 47.5.4; 7TH CIR. R. 53(b)(2)(iv); 8TH CIR. R. 28A(i). *But see* 9TH CIR. R. 36-3(a); 10TH CIR. R. 36.3(A); 11TH CIR. R. 36-2. The use of the word "precedent" without more can be confusing. Binding precedent is "precedent that a court must follow." BLACK'S LAW DICTIONARY 1195 (7th ed.). In contrast, persuasive precedent is "precedent that a court may either follow or reject." *Id.* Given that the thrust of the current circuit rules is to preclude the binding effect of unpublished opinions, it appears that the Fifth, Seventh, and Eighth Circuits' rules are needlessly imprecise. *See* Shuldberg, *supra* note 1, at 573 (concluding that citation to unpublished opinions should be allowed for persuasive purposes only); *cf.* George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 492 (1986) (stating that the "best rule . . . appears to be the free citation of unpublished opinions as persuasive authority"). Although Weaver would allow citation to *any* unpublished opinion for its persuasive value, even he admits free citation could be problematic. *Id.* For Weaver, this concern is that a court might lend binding authority to a non-precedential unpublished opinion. *Id.* at 492–93. Although this is indeed one concern, more important is the fact that allowing free citation would negate a significant part of the savings restricted citation was supposed to generate by requiring judges and attorneys to locate and analyze these opinions. Shuldberg, although ultimately concluding that unrestricted citation for persuasive purposes is too broad, states that because attorneys will research such opinions to

res judicata, and collateral estoppel."[166] Furthermore, citation to unpublished opinions should be "disfavored,"[167] and this would include the court[168] as well as litigants.[169] However, parties should be permitted to "cite an unpublished opinion of this [or any other] court if the opinion has persuasive value on a material issue and no published opinion of this or any other court would serve as well."[170] When so doing, counsel for the party should be required to execute an affidavit asserting as much.[171] Furthermore, the party should be required to "serve[ ] a copy thereof

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derive information and insights anyway, "the cost savings imagined by the no-citation rules will be significantly diminished." Shuldberg, *supra* note 1, at 572.

[166] 9TH CIR. R. 36-3(a).

[167] 4TH CIR. LOC. R. 36(c). At least two commentators agree that this is the preferred formulation. *See* Berman & Cooper, *supra* note 13, at 2026. Not all agree, however. Dragich has called circuit court rules that state that citation to unpublished opinions are "disfavored," yet allow such citation, "unacceptably ambiguous statement[s] of precedential effect." Dragich, *supra* note 31, at 791. Nevertheless, the reason this should be so is not immediately clear, especially under the rule proposed here. Unpublished opinions under this proposed rule are not binding precedent. Stating that citation to unpublished opinions is "disfavored" is meant to clarify that citation to these opinions as persuasive authority is to be the exception rather than the norm.

[168] The need for courts to strictly comply with such a rule is essential because "[i]f a court relies on an unpublished opinion, even once, that court not only invites, but almost demands, that other judges on that court, lower courts, and attorneys practicing in the court's jurisdiction research the court's unpublished as well as its published opinions." Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REF. 119, 146 (1994); *see* Honigsberg & Dikel, *supra* note 25, at 290–94 (discussing the problematic circumstances judges face when parties cite to unpublished opinions).

[169] An example of such a rule is 4TH CIR. LOC. R. 36(c), which provides:

> In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

Id.

[170] 8TH CIR. R. 28A(i); *see* Shuldberg, *supra* note 1, at 571–73 (contending that formulation of a rule in these terms makes the rule "flexible enough to allow citation to an unpublished opinion in circumstances where a published opinion has addressed the same issue but with a different result").

[171] Without rigorous enforcement of this modified citation rule, citation to unpublished opinions might possibly mushroom as each attorney decides, whether true or not, that no published opinion would serve as well. By requiring an affidavit, an attorney will be more likely to seriously evaluate the necessity of citing to an unpublished opinion, thereby moderating any temptation to over-cite. Furthermore, this requirement will enable the court to treat such violations more formally, perhaps resulting in professional misconduct charges. Although admittedly dated, one article has noted that "no judge has ever sanctioned an attorney for citing an unpublished case." Honigsberg & Dikel, *supra* note 25, at 291. In addition, current research confirms these authors' finding that "there is no circuit rule on sanctioning attorneys in these instances." *Id.* Yet these same authors have found the notion of sanctioning attorneys

on all other parties in the case and on th[e] Court."[172] Finally, a model rule should require that a party "indicate the opinion's unpublished status"[173] in its brief.

VI. CONCLUSION

After twenty-five years of experimentation, the patchwork of current circuit court rules that regulates the restricted publication and citation of opinions needs to be standardized. Although the initial impulse to test various formulations of such rules was praiseworthy, it is clear this was not intended to be an unending experiment. Basic notions of fairness demand that litigants in different circuits have the same ability to cite to unpublished opinions. In addition, the establishment of uniform publication procedures and criteria should help to ensure even growth of the law through the various circuits. Although legitimate arguments can be raised against the various choices made in the model rule put forth in this note, it offers a starting point for a much-needed discussion on standardizing the rules that govern restricted publication and citation of opinions.

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problematic, contending that judges who believe that "unpublished decisions can contribute to their understanding of the problem" might "feel uncomfortable sanctioning an attorney who advises them on the state of the unpublished law," especially if that particular judge had written the unpublished opinion being cited. *Id.* at 296. While potentially a real problem, the authors voiced these concerns in the context of strict no-citation rule. Under the rule proposed here, attorneys can cite to cases provided that no other published case would serve as well. This should serve to greatly alleviate such concerns—albeit not entirely.

[172] 6TH CIR. R. 28(g).

[173] 8TH CIR. R. 28A(i).

APPENDIX A

PROPOSED MODEL RULE

XX.1 Publication of Opinions

(A) There shall be a general presumption in favor of publication.
(B) This presumption may be overcome when an opinion does not:
  (1) establish a new rule of law, or alter or modify an existing rule of law;
  (2) call attention to an existing rule of law that appears to have been generally overlooked;
  (3) involve a legal or factual issue of continuing or unusual public or legal interest;
  (4) explain, criticize, or review the history of existing decisional or enacted law in a non-duplicative manner;
  (5) apply an established rule of law to a novel fact situation;
  (6) create or resolve a conflict of authority with a decision of any federal or state appellate court;
  (7) involve a decision issued pursuant to an order of remand from the Supreme Court, except when rendered solely in ministerial obedience to specific directions from that Court; or
  (8) reverse a published agency or district court decision, or affirm a decision of the district court upon grounds different from those set forth in the district court's published opinion.
(C) A panel decision not to publish an opinion must be unanimous. In addition, a vote in favor of publication by the majority of the active judges on the court may override a panel decision not to publish.
(D) Any person, for good cause shown, may at any time request reconsideration of the court's publication decision.

XX.2 Citation to Unpublished Opinions

Unpublished opinions are not binding precedent, except under the doctrines of res judicata, collateral estoppel, or law of the case. Generally, citation to unpublished opinions as persuasive authority is disfavored. However, a party may cite an unpublished opinion of this or any other court if the opinion has persuasive value on a material issue and no published opinion of this or any other court would serve as well. Should a party cite an unpublished opinion, the attorney for that party must:
(A) execute an affidavit to be filed with the court asserting that, through diligent research, the attorney has determined that no other published opinion of any court would serve as well;
(B) serve a copy of the unpublished opinion on all parties to the case and on

the court; and

(C) prominently indicate the opinion's unpublished status in the party's brief.

APPENDIX B

CURRENT PUBLICATION AND CITATION PROVISIONS IN THE FEDERAL COURTS OF APPEALS

Circuit	Publication Decision-Maker	Person Who Can Request Reconsideration	Publication Criteria	When Citation to Unpublished Opinions is Permissible
Fed.	Any judge can force publication.	Any person; only for sixty days post-judgment.	Not published if it does not add significantly to the body of law.	May be cited only for purposes of claim preclusion, issue preclusion, judicial estoppel, law of the case, and a few other instances.
1st	Any judge can force publication.	Any party or other interested person.	New rule of law, modify existing rule, apply to novel facts, significant guide to future litigants.	Only in related cases.
2d	Any judge can force publication.	Any person.	Not published when "no jurisprudential purpose would be served" by publication.	Only in related cases.
3d	Majority of the panel.	No explicit provision.	Published if "it has precedential or institutional value."	No restrictions, presumably.
4th	Author or majority of panel.	Counsel to parties.	Establishes, alters, modifies, clarifies, or explains law in circuit; legal issue of public interest; criticizes existing law; historical review; resolves conflict between panels of court or creates conflict with another circuit.	Disfavored, except for res judicata, estoppel, law of the case; can cite if no published opinion would serve as well and provide copy.

Circuit	Publication Decision-Maker	Person Who Can Request Reconsideration	Publication Criteria	When Citation to Unpublished Opinions is Permissible
5th	Any judge can force publication.	Any judge in circuit or any party.	Establishes new law, alters or modifies existing law, calls attention to overlooked law; applies law to significantly different facts; explains, criticizes, or reviews history of a law; creates or resolves conflict within circuit or between circuit and another; significant public interest; case has been reviewed by Supreme Court. *May* be published if has concurrence or dissent, reverses decision below or affirms on different grounds.	Issued before 1-1-96: are precedent but "should be cited" only for res judicata, collateral estoppel, law of the case and a few others instances. Issued on or after 1-1-96: not precedent except for res judicata, collateral estoppel, or law of the case and a few other instances; can be cited as persuasive authority if copy is provided.
6th	Any judge can force publication.	No explicit provision.	Establishes new law, alters or modifies existing law, applies law to novel facts; creates or resolves conflict within circuit or between circuit and another; continuing public interest; concurrence or dissent; reverses decision below, unless reversal is caused by change in law or fact, or is remanded to district court when case reversed or remanded by Supreme Court; addresses published decision; case has been reviewed by Supreme Court.	Disfavored, except for res judicata, collateral estoppel, law of the case; can cite as persuasive authority if no published opinion would serve as well and copy served on parties and court.
7th	Majority of the panel.	Any person.	Establishes new, or changes existing law; continuing public interest; criticizes or questions existing law; significant contribution to legal literature; historical review; describes legislative history; resolves or creates conflict; reverses published decision; pursuant to non-ministerial remand by Supreme Court.	Opinions citable only for purposes of res judicata, collateral estoppel, or law of the case; unpublished opinions from other courts citable only if that court would allow citation.

Circuit	Publication Decision-Maker	Person Who Can Request Reconsideration	Publication Criteria	When Citation to Unpublished Opinions is Permissible
8th	Presumably a majority of the panel.	No explicit provision.	Establishes new law, questions or changes existing law; new interpretation of or conflicts with federal or state appellate decision; applies law to significantly different facts; continuing or unusual public or legal interest; does not accept rationale of published decision being reviewed; historical review; resolves conflict.	Not precedent and generally should not cite to them, except for res judicata, collateral estoppel, or law of the case; may cite for persuasive value if no published opinion of this or any other court would serve as well; must attach copy.
9th	Presumably a majority of the panel.	No explicit provision.	Establishes, alters, modifies, or clarifies law; calls attention to overlooked law; criticizes existing law; legal or factual issue of unique interest or substantial public importance; disposition of case in which opinion was published unless unnecessary to clarify; reversal or remand by Supreme Court; concurrence or dissent and author requests publication.	May only be cited for res judicata, collateral estoppel, or law of the case and a few other instances.
10th	Presumably a majority of the panel.	No explicit provision.	Published if requires application of new points of law that make decision a valuable precedent; ordinarily publishes opinion if previous disposition has been published.	Disfavored; may be cited for persuasive value if issue has not been addressed by published opinion and would assist court in disposition.
11th	Presumably a majority of the panel.	Panel itself or party; requires unanimity.	No explicit criteria.	May be cited as persuasive authority; must attach copy.
D.C.	Presumably a majority of the panel.	Any person; only for thirty days post-judgment.	First impression; alters, modifies, clarifies law; calls attention to overlooked law; criticizes or questions law; resolves conflict within circuit or creates one with another circuit; reverses published decision or affirms on different grounds; general public interest.	Prohibits citation to circuit's unpublished opinions, all district courts' unpublished opinions, and other circuit courts' opinions if they have similar type of rule.